COUNTERSTATEMENT OF QUESTION PRESENTED

The National Highway Transportation Safety Administration ("NHTSA") has adopted a safety standard pursuant to the National Traffic and Motor Vehicle Safety Act of 1966 ("Safety Act") that regulates truck air-brake systems generally, but does not impose any requirements upon truck manufacturers as to whether to equip their air-brake systems with antilock devices. The question presented is:

Whether the Safety Act preempts state common law tort actions based on certain manufacturers' alleged failure to equip their truck air-brake systems with antilock devices, notwithstanding the Safety Act's provision that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law," 15 U.S.C. § 1397(k), and notwithstanding the fact that tort judgments against the manufacturers would not conflict with the Safety Act or any aspect of the NHTSA standard regulating air-brake systems.

(i)

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S. Rep. No. 1301, 89th Cong., 2d Sess. (1966)	21

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The Law of Preemption, A Report of the United States Appellate Judges Conference of the American Bar Association (1989)	36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-286

FREIGHTLINER CORPORATION,
Petitioner,
v.
BEN MYRICK AND EMILY MYRICK,
Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Petitioner,
v.
JACK LINDSEY, Executor of the Estate and Surviving Spouse of Grace C. Lindsey,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR RESPONDENTS

COUNTERSTATEMENT OF THE CASE

A. The State Law Tort Actions

1. *Ben Myrick and Emily Myrick v. Freightliner Corporation*

On February 6, 1989, a tractor-trailer manufactured in 1987 by petitioner Freightliner Corporation was traveling southbound on a wet highway in Morgan County, Georgia. The driver of the tractor-trailer applied the brakes because

of traffic ahead. The brakes locked and caused the trailer to jackknife into the path of a northbound tractor-trailer driven by respondent Ben Myrick. The impact tore the cab off Mr. Myrick's tractor-trailer and threw him from the vehicle. Mr. Myrick suffered head, abdominal, and spinal injuries; he is permanently paraplegic and brain damaged.

Mr. Myrick and his wife, Emily Myrick, brought a state law tort action against petitioner Freightliner Corporation. *See* Joint Appendix ("JA") 3-8.[1] The complaint alleged, in pertinent part, that the accident was caused by the failure of Freightliner to equip its tractor with antilock brakes, and that this failure rendered Freightliner subject both to strict liability and to liability for negligence. JA 4, 7. Mr. Myrick sought compensatory damages, and his wife sought damages for loss of consortium. JA 6-7.

2. *Lindsey v. Navistar International Transportation Corporation*

On September 5, 1989, a tractor-trailer manufactured in 1982 by International Harvester Company (now petitioner Navistar) was traveling southbound on a highway in Oconee County, Georgia. The driver of the tractor-trailer applied the brakes because a car had stopped in front of him. The brakes locked and caused the tractor to jackknife into the path of a northbound automobile driven by Mrs. Grace Lindsey. Mrs. Lindsey was killed.

Mrs. Lindsey's surviving spouse and the executor of her estate, Mr. Jack Lindsey, brought a state law tort action against International Harvester and Navistar. JA 9-12.[2]

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[1] The Myricks' tort action also named the manufacturer of the trailer, Freuhauf Corporation. Freuhauf was subsequently dismissed from the action by agreement of the parties. *See* Appendix to Petition for Writ of Certiorari ("Pet. App.") 3a n.1.

[2] International Harvester was subsequently dismissed from the case, leaving Navistar as the sole defendant.

The complaint alleged, in pertinent part, that the accident was caused by the failure of the manufacturer to equip the tractor with antilock brakes, a failure that rendered the defendants subject to design defect liability and liability for negligence. JA 10-11. The complaint sought both compensatory and punitive damages. JA 11-12.

3. *Proceedings Below*

Both the *Myrick* and *Lindsey* tort actions were removed to federal court on diversity grounds. In both cases, the federal district courts granted motions by the defendants for summary judgment and dismissed plaintiffs' tort claims on the ground that they were preempted by the National Traffic and Motor Vehicle Safety Act of 1966 ("Safety Act" or "Act"). *See* Pet. App. 34a-45a (*Myrick*); Pet. App. 46a-47a (*Lindsey*). The Eleventh Circuit consolidated the two cases for purposes of appeal, and by a 2-1 panel decision reversed the district courts' conclusions that plaintiffs' tort claims were preempted by the Safety Act. *See* Pet. App. 1a-33a. Petitions for rehearing and rehearing *en banc* were denied, Pet. App. 48a-49a, and this Court granted a petition for writ of certiorari to review the Eleventh Circuit's decision.

B. The Federal Statutory Framework

1. Congress enacted the Safety Act in 1966 for one stated purpose: "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381.[3]

The Safety Act provides that the Secretary of Transportation—who acts through his or her delegee, the National Highway Transportation Safety Administration ("NHTSA")—"shall establish by order appropriate Fed-

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[3] Congress recodified the Safety Act in the summer of 1994 without substantive change. *See* Pub. L. No. 103-272, 108 Stat. 745. Because the pre-1994 version of the Act is at issue here, we cite the pre-1994 codification in this brief.

eral motor vehicle safety standards." 15 U.S.C. § 1392(a). The Act defines "[m]otor vehicle safety standards" to mean "a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria." 15 U.S.C. § 1391(2).

Manufacturers must certify compliance with performance standards established by NHTSA in order to sell their vehicles and equipment, 15 U.S.C. §§ 1397(a)(1)(A), 1403, and are subject to civil penalties for the violation of NHTSA standards, 15 U.S.C. § 1398. The Act does not establish any mechanisms for compensating persons injured in traffic accidents.

2. The Safety Act contains both a preemption provision and a "savings" provision preserving common law liability. The preemption provision states:

> **Supremacy of federal standards; allowable higher standards for vehicles used by Federal or State governments.**
>
> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard. [15 U.S.C. § 1392(d).]

The savings provision states:

> **Continuation of common law liability.**
>
> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law. [15 U.S.C. § 1397(k).][4]

C. NHTSA Standard 121

1. Shortly after the Safety Act was passed, the Secretary's delegee prior to NHTSA—the Federal Highway Administration—published an Advance Notice of Proposed Rulemaking announcing an intention to promulgate a standard establishing requirements for various aspects of performance for air brakes—the type of brakes then, and now, commonly utilized in buses, trucks and trailers. *See* 32 Fed. Reg. 14,278, 14,279 (1967).

After a prolonged rulemaking proceeding described in some detail in *Paccar, Inc. v. NHTSA*, 573 F.2d 632, 636-38 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978) ("*Paccar*"), NHTSA adopted a final standard—denominated as Standard 121—applicable to air-brake systems in buses, trucks and trailers. *See* 39 Fed. Reg. 39,880, 39,881 (1974). At the time, Standard 121 required, *inter alia*, that trucks and trailers stop within specified distances and that the wheels of the vehicles not lock uncontrollably during those stops. *Id.* Although Standard 121 did not require that any particular technology be used to meet these performance requirements, most manufacturers notified NHTSA that a particular antilock device,

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[4] The above-quoted language—which is the operative language for this case—is the original language of both provisions as enacted in 1966, with the exception of the sentence in the preemption provision stating that "Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard." That sentence was added to the preemption provision in 1982. *See* Pub. L. No. 97-331, § 3, 96 Stat. 1619.

which had by then been developed, would be necessary to achieve compliance. *See Paccar,* 573 F.2d at 637.[5]

Within a year after Standard 121 took effect, NHTSA reported that the antilock systems in thousands of vehicles had worked without a single report of a safety related defect. 41 Fed. Reg. 8783, 8785 (1986). While some manufacturers reported that the antilock systems in their vehicles were not functioning properly, NHTSA found that this was due in large part to avoidable problems encountered by the manufacturers in attempting to mass produce antilock devices, and not to the lack of available technology. *Id.; see also id.* at 8786 (although some vehicles produced to comply with Standard 121 "demonstrate[d] unsatisfactory handling characteristics [, t]he source of the problem is not technological infeasibility of producing vehicles with desirable handling characteristics").[6]

2. In January 1975, Paccar (a truck manufacturer) and two trade associations filed a petition in the Ninth Circuit for judicial review of Standard 121. *Paccar*, 573 F.2d 632. The petitioners in *Paccar* argued that the statutory prerequisites for issuance of the performance requirements in Standard 121 that effectively required antilock devices had not been satisfied because, *inter alia*, (1) NHTSA had failed to demonstrate a need to improve the

[5] As described by the *Paccar* court, an antilock device consists of a minicomputer attached to each axle of a truck or trailer that "senses" when a wheel begins to lock and momentarily releases the brake to regain traction. *Paccar,* 573 F.2d at 637.

[6] Although NHTSA thus concluded that Standard 121 was "practicable" as written, the agency eased the stopping distance requirements in order to "improve handling characteristics while design problems are being resolved by the manufacturers." 41 Fed. Reg. at 8786. At the same time, based on the performance history of vehicles manufactured to comply with Standard 121, NHTSA refused to eliminate the "no lockup" requirement and reiterated "its conviction that antilock is sufficiently reliable to justify its continued installation in satisfaction of the standard's requirements for directional stability." *Id.* at 8787.

safety performance of air-braked vehicles; and (2) antilock devices were unreliable and actually rendered vehicles potentially more dangerous than they would be without such devices. *Id.* at 639.

The *Paccar* court rejected the first argument, finding that, in view of the extensive record demonstrating that greater braking stability would improve highway safety, "NHTSA was justified in promulgating a Standard requiring improved air brake systems and stability mechanisms for the industry." *Id.* at 640. The court found, however, that "because of unforeseen problems in the development of the new braking systems, the Standard was neither reasonable nor practicable *at the time it was put into effect.*" *Id.* (emphasis added).[7] Thus, the *Paccar* court stated:

> [T]he comprehensive data before us indicate that there is a strong probability that the performance of a substantial number of vehicles whose braking systems have been altered to include "overpowered" front axles and antilock devices has created a potentially more hazardous highway situation than existed before the Standard became operative. [*Id.* at 643.]

Accordingly, the *Paccar* court concluded that "until such time as NHTSA develops evidence that the new braking systems required by the Standard do not create the possibility of greater danger to the public, those parts of the Standard requiring heavier axle and the antilock device should be suspended." *Id.* The court expressly limited its holding as follows:

> We hold only that more pro[b]ative and convincing data evidencing the reliability and safety of vehicles

[7] The court stated that while "[s]ome trucks were easily able to meet the stopping requirements of the Standard . . . critical problems began with mass production of vehicles designed to meet the Standard." 573 F.2d at 641. The court equated "stopping requirements" with "the antilock requirement." *Id.* at 639. NHTSA subsequently indicated that the court's locution in this regard was imprecise. 43 Fed. Reg. 48,646, 48,647 (1978).

> that are equipped with antilock and in use must be available before the agency can enforce a standard requiring its installation. [*Id.*]

3. After *Paccar*, NHTSA published an Advance Notice of Proposed Rulemaking seeking comments on, *inter alia*, issues left open by that decision. *See* 44 Fed. Reg. 9783 (1979). In the Notice, NHTSA stated that it had received "several inquiries from trucking companies asking if they are required to disconnect their antilock systems" in light of the *Paccar* decision. *Id.* at 9784. In response to these inquiries, NHTSA "recommend[ed] that antilock systems on existing vehicles be maintained in proper working condition, in order to achieve the benefits for which the systems were designed." *Id.* The agency went on to reject a request that it

> make a finding that all vehicles built to conform to the invalidated requirements contain a safety-related defect that justifies their recall. The NHTSA has conducted a vigorous campaign to insure that all defects that might arise in components installed to meet the standard are recalled and fixed before they cause any damage. This program has not uncovered evidence that the componentry installed contains inherent problems that create a hazard to the public. If it had, the agency would have taken action to recall all componentry earlier. [*Id.*]

Finally, NHTSA noted that even Paccar itself—the truck manufacturer that had successfully challenged Standard 121 before the Ninth Circuit—shared its view of the safety benefits of antilock systems: "[I]t is PACCAR's engineering judgment that the wheel lockup presents enough of a safety problem that the company continues to supply antilock on this axle although it believes the Ninth Circuit court ruling in fact relieves it of this obligation." *Id.* at 9785.

4. Six months later, NHTSA published amendments to Standard 121 to implement the *Paccar* decision. *See* 44 Fed. Reg. 46,849 (1979). NHTSA added language to the standard stating that the parts of the standard invalidated by *Paccar* "are not applicable to trucks and trailers." *See* 49 C.F.R. § 571.121 (S3). NHTSA explained:

> The regulation is being amended in this manner rather than deleting or revising the working of each of the affected sections in order to disturb the actual text of the standard as little as possible. In that way, the affected sections can most easily be reinstated when suitable solutions to the requirements laid down by the Court are found. In addition, by retaining the standard's language in its existing form, manufacturers are made aware of what the agency still considers to be reasonable standards for minimum acceptable performance, and those manufacturers that wish to construct their vehicles in accordance with the non-mandatory sections of the standard will have the necessary guidance to do so. [44 Fed. Reg. at 46,849.] [8]

5. Since 1979, NHTSA has taken no final regulatory action with respect to the "no lockup" performance requirement for trucks and trailers invalidated in *Paccar*.[9] Thus, at the time that the vehicles involved in the accidents at issue in *Myrick* and *Lindsey* were manufactured and sold (1987 and 1982 respectively), and at the time of the accidents themselves (1989), the federal regulations

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[8] *Paccar* left intact a provision in Standard 121 that contained two requirements for "a vehicle equipped with an antilock system." *See* 49 C.F.R. § 571.121 (S5.5). This provision was not altered in the 1979 amendments to Standard 121. Thus, truck and trailer manufacturers that elected to install antilock systems after the 1979 amendments remained under an obligation to conform those systems to the requirements of this provision.

[9] In 1990, NHTSA announced its intention to revisit the question of whether to require antilock systems in trucks and trailers. *See* 55 Fed. Reg. 44,848 (1990). And, in 1991, Congress directed NHTSA to initiate a rulemaking proceeding to examine the use of antilock systems, *see* P.L. No. 102-240, Title IV, § 4012, 105 Stat. 2157, which the agency did in 1992, *see* 57 Fed. Reg. 24,212 (1992). To date, NHTSA has not promulgated a final rule on the subject of antilock systems in trucks and trailers.

on the subject of air brakes in trucks and trailers remained as they were after NHTSA's adoption of the 1979 amendments to Standard 121.

INTRODUCTION AND SUMMARY OF ARGUMENT

Mr. Myrick suffered grievous physical injuries and Mrs. Lindsey was killed as the result of accidents involving trucks manufactured by petitioners. Mr. Myrick and his wife and Mr. Lindsey brought tort suits against petitioners under the common law of Georgia to seek compensation for losses suffered from the accidents.

Georgia's ability to provide compensation to the victims of traffic accidents is at the core of the States' historic police powers. The Safety Act does not purport to displace this State function. The Act does not establish a federal scheme for compensating the victims of highway accidents. And, in sweeping terms, the Act states: "Compliance with *any* Federal motor vehicle safety standard issued under this subchapter does not exempt *any* person from *any* liability under common law." 15 U.S.C. § 1397(k) (emphasis added).

The circumstances of this case provide not the slightest reason for seeking to circumvent the plain words of this savings provision. There is simply no conflict between the Safety Act and Standard 121, on the one hand, and the state tort claims brought by respondents, on the other. Standard 121 does not in any respect purport to preclude a truck manufacturer from installing antilock devices on its vehicles. As originally adopted, the "no lockup" requirement of Standard 121 effectively required installation of antilock devices. The amendment after *Paccar* declared that requirement "not applicable to trucks and trailers." Since this amendment, truck manufacturers have been free, as far as federal regulation is concerned, to install or not to install antilock devices, just as they were before Standard 121's original adoption. Indeed, if anything, Standard 121 as amended seems to encourage truck manufacturers favorably to consider utilizing antilock devices:

> [By] retaining the standard's language in its existing form, manufacturers are made aware of what the agency still considers to be reasonable standards for minimum acceptable performance, and those manufacturers that wish to construct their vehicles in accordance with the non-mandatory sections of the standard will have the necessary guidance to do so. [44 Fed. Reg. at 46,849.]

Thus, Standard 121 as amended contains no command as to whether truck manufacturers should install antilock devices. In these circumstances, a determination under Georgia tort law that petitioners' failure to install antilock devices was tortious would in no way conflict with any requirement or purpose of Standard 121.

The question here is whether, nevertheless, by virtue of Standard 121, the Safety Act precludes respondents from proving their claims under Georgia law and receiving the remedies that Georgia law provides. Such a result would be extraordinary given the powerful state interest on the one side and the absence of a federal interest on the other. And, as we show in this brief, the Safety Act does not call for any such result.

The beginning and the end of analysis as to whether a federal statute preempts state law is the determination as to whether Congress intended the statute to have that effect.[10] This determination of congressional intent is not

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[10] *See, e.g., Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137-38 (1990) ("[T]he question whether a state action is preempted by federal law is one of congressional intent.") (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985)); *Malone v. White Motor Co.*, 435 U.S. 497, 504 (1978) ("It is uncontested that whether the [state] statute is invalid under the Supremacy Clause depends on the intent of Congress."); *Rice v. Santa Fe Elevator*, 331 U.S. 218, 230 (1947) ("The question in each case is what the purpose of Congress was."); *California Fed. Savs. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987) (plurality opinion) ("In determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause

made in a vacuum. Rather, it is informed by presumptions derived from the basic principles of our federal system. Given the status of the States in that system, there is a general presumption against the conclusion that Congress intended a federal enactment to displace state law—a presumption that can be overcome only by a clear manifestation of congressional intent to the contrary.[11] This presumption is at its strongest when the question is, as here, whether Congress intended to prohibit the States from protecting the health and safety of their citizens through the exercise of such traditional and core police power functions as the provision of common law tort remedies.[12] In this connection, whether the federal statute provides "any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct"—as the statute here does not—is par-

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of the Constitution, our sole task is to ascertain the intent of Congress.").

[11] *See, e.g., Building & Trades Council v. Associated Builders & Contractors*, 113 S. Ct. 1190, 1194, 1198 (1993) ("'Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.'") (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981) ("[T]he exercise of federal supremacy is not lightly to be presumed.") (internal quotations omitted); *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942) ("[T]his Court has long insisted that an intention of Congress to exclude States from exerting their police power must be clearly manifested.") (internal quotations omitted).

[12] *See, e.g., Hawaiian Airlines, Inc. v. Norris*, 114 S. Ct. 2239, 2243 (1994); *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (1993); *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992); *see also Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 714-15 (1985) ("[T]he presumption [is] that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause . . . . [W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (internal

ticularly significant.[13] In the absence of such a substitute, plaintiffs who could prove that their physical injuries resulted from the tortious conduct of defendants under state law would be left wholly without any remedy—a result that should not readily be attributed to Congress.

Measured in this light, the Safety Act cannot be understood to evidence an intent by Congress that state law tort actions should be preempted in the circumstances presented here. Petitioners' argument to the contrary is premised on two alternative theories of preemption. First, petitioners argue that respondents' common law actions are expressly preempted under the provisions of the Safety Act that state the congressional determination with respect to preemption. Second, petitioners argue that, even if the express provisions do not preempt respondents' common law actions, the Safety Act impliedly preempts those actions because the relief sought by respondents would somehow be in conflict with Standard 121.

In part I, *infra*, we show that the two provisions of the Safety Act that expressly set forth Congress' determination with respect to preemption—the preemption provision (15 U.S.C. § 1392(d)) and the savings provision (15 U.S.C. § 1397(k))—do not preempt respondents' common law actions. Review of the language of the preemption provision, and the legislative history, demonstrates that the provision is intended to preempt state legislative or administrative safety standards that conflict with a federal safety standard, and not to preempt com-

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quotations omitted); *cf. BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1765 (1994) ("To displace traditional State regulation in such a manner, the federal statutory purpose must be 'clear and manifest.'") (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990)).

[13] *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 663-64 (1954); *see also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984); *Cipollone*, 112 S. Ct. at 2630-31 (Blackmun, J., joined by Kennedy, J. and Souter, J., concurring in part, concurring in the judgment in part, and dissenting in part).

mon law tort actions. In addition, the preemption provision does not in any event come into play where, as here, there is no federal safety standard regulating the "aspect of performance"—here wheel lockup during the braking process—that is at issue in the common law actions.

Even if, *arguendo*, the preemption provision were to apply here, respondents' common law actions would be preserved by the savings provision. That provision states in sweeping and unambiguous terms that "[c]ompliance with any . . . safety standard . . . does not exempt any person from any liability under common law." The plain terms of this provision leave no room for a conclusion that respondents' common law actions are expressly preempted by the Safety Act. And the legislative history confirms that Congress meant the savings provision to protect such common law actions from preemption.

In part II, *infra*, we show that there is no implied preemption here. First, petitioners' argument for implied preemption rests on an incorrect factual premise. There is no conflict between the federal safety standard here and the relief sought in respondents' common law actions. There is no federal safety standard that requires any truck manufacturer to install or not to install antilock devices. A common law judgment that petitioners' failure to install antilock devices on the particular trucks involved was tortious would not conflict with any federal requirement or objective.

Second, petitioners' argument for implied preemption rests on an incorrect legal premise. Congress has directly spoken to the precise question of preemption at issue here and has in express terms declared its intent not to preempt common law actions such as those here. Congress cannot be understood to have intended that courts would imply a congressional intent to preempt in the very circumstances in which Congress has expressly precluded preemption.

The preemption provision and the savings provision reflect Congress' effort to strike a balance between the federal interest in regulating motor vehicle safety and the States' interest in providing common law remedies for the victims of motor vehicle accidents. It is not for the courts to redraw that balance through the doctrine of implied preemption.

ARGUMENT

I. THE EXPRESS PROVISIONS OF THE SAFETY ACT DO NOT MANIFEST AN INTENT TO PREEMPT STATE TORT LAWS

The Safety Act contains two provisions that expressly address the extent to which the Act is intended to preempt state law: a provision stating the preemptive effect of the Act, 15 U.S.C. § 1392(d), and a savings provision captioned, in the codification of the Act, "[c]ontinuation of common law liability." 15 U.S.C. § 1397(k). The threshold question in this case is whether these provisions manifest an intention to preempt state tort law remedies in the circumstances presented here. We show in this part of the brief that these provisions cannot be read to effect such preemption.

A. The Language of the Preemption Provision

The preemption provision of the Act states in pertinent part:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no state . . . shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any *safety standard* applicable to the *same aspect of performance* of such vehicle or item of equipment which is not identical to the Federal Standard. [15 U.S.C. § 1392(d) (emphasis added).]

In two respects this language indicates that preemption was not intended in the circumstances presented here.

1. *"Safety Standard"*

The preemption provision prohibits a State from establishing or continuing in effect a "safety standard" that conflicts with a "safety standard" established under the Act. While the term "safety standard" may not be wholly self-defining, in the context of its usage throughout the Act, it is strongly suggestive of an intention to preempt state legislative or administrative standards and not common law tort standards.

First, "safety standard" is the term used throughout the Act to refer to the administrative standards that the Secretary is authorized to adopt pursuant to the Act.[14] The use of the same term to refer to the state norms that may be displaced by a Federal "safety standard" is, under normal rules of statutory construction, indicative that the term is meant to have the same meaning.[15] Thus, the most natural reading of the provision is that a "safety standard" promulgated under the Act will preempt a state legislative or administrative "safety standard" that conflicts with the federal standard.

Second, while, as petitioners correctly point out, state tort law may have the effect of establishing substantive standards of conduct, "safety standard" is not the term Congress would likely have used to refer to the substantive consequences of state tort law. When Congress has expressly intended to preempt state tort law, Congress has used broader, less specific language than "safety standard." Thus, Congress could have easily used in place of, or in addition to, "safety standard," more general terms like "law," "common law," or "requirement."[16] Indeed, as we discuss below, Congress was conscious of the potential interplay between Safety Act standards and common law actions, and dealt expressly with that interplay in the savings provision. It is unlikely that Congress would have intended to address that interplay, with its profound implications for federalism (*see supra*, pp. 11-13), through the mere reference to the term "safety standard" in the preemption provision.

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[14] *See, e.g.*, 15 U.S.C. § 1392(e) ("[t]he Secretary may by order amend or revoke any [f]ederal motor vehicle safety standard . . ."); *id.* § 1392(h) ("[t]he Secretary shall issue initial [f]ederal motor vehicle safety standards . . ."); *id.* § 1392(i)(1)(A) ("the Secretary shall publish proposed [f]ederal motor vehicle safety standards . . ."); *id.* § 1392(i)(1)(B) ("the Secretary shall promulgate [f]ederal motor vehicle safety standards . . .").

[15] *See Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992) (it is a "basic cannon of statutory construction that identical terms within an Act bear the same meaning") (citing cases); *Morrison-Knudsen Constr. v. Director, Office of Workers Comp. Programs*, 461 U.S. 624, 633 (1983) ("a word is presumed to have the same meaning in all subsections of the same statute").

2. *"The Same Aspect of Performance"*

Even if, contrary to what we have just argued, the term "safety standard" were read to include common law tort duties, the preemption provision would not apply in the circumstances of this case.

The preemption provision is designed to ensure that a federal safety standard will displace a conflicting state

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[16] Petitioners cite a number of cases and authorities outside the preemption context that use the word "standard" to refer to common law tort duties, and one such case even using the term "safety standard" in this sense. Pet. Br. at 30 & n.17. But contrary to petitioners' suggestion, this Court has never had occasion to decide whether the term "safety standard," as used in a statutory preemption provision, is sufficient standing alone to effect the preemption of common law tort claims. In *CSX Transp. Inc. v. Easterwood*, the preemption provision found to embrace common law tort duties did use the word "standard," but the word "standard" appeared at the end of a string of broader terms—"laws, rule, regulation, order"—and the *CSX* Court did not indicate which of the various terms in the preemption provision it found to embrace common law tort duties. *See* 113 S. Ct. at 1737. And in *Cipollone v. Liggett Group, Inc.*, the words found by the Court to embrace common law tort duties were the words "requirement or prohibition . . . imposed under State law," not "safety standard." *See* 112 S. Ct. at 2619-20.

safety standard. The provision defines when such a conflict exists by use of the term "the same aspect of performance" of a motor vehicle or item of motor vehicle equipment. If a state safety standard does not impose a conflicting requirement on "the same aspect of performance," the preemption provision of the Act has no application to the state standard.

The "aspect of performance" at issue here is wheel lockup during the braking process. *See supra*, pp. 5-10. The net result of NHTSA's efforts to address the issue of wheel lockup is that Standard 121, as amended, does not regulate at all that "aspect of performance" of trucks and trailers. Indeed, Standard 121, as amended, expressly states that the requirements respecting wheel lockup applicable to other vehicles "are not applicable to trucks and trailers." 49 C.F.R. § 571.121 (S3).

Thus, this precondition for application of the preemption provision does not exist here. If there is no federal safety standard regulating an "aspect of performance," a state safety standard regulating that aspect of performance is outside the reach of the preemption provision.

It is, of course, possible to give the term "aspect of performance" a broader reading. For example, it could be argued that the "aspect of performance" regulated by Standard 121 is the entire braking system, so that any state safety standard regulating any aspect of the braking system would be regulating "the same aspect of performance." Such a reading would bring the preemption provision into play even when there is no conflict between the substantive requirements of the federal safety standard and the substantive requirements of the state safety standard. Such a reading would make the term "aspect of performance" nothing but words to be manipulated and would result in preemption well beyond what is required to accomplish the manifest objective of the preemption provision. That objective is apparent from the use of the

term "identical to the Federal standard" as the determinant for whether a state safety standard regulating "the same aspect of performance" is preempted. That determinant is a proxy for the concept of conflict. Here, there can be no conflict between federal and state requirements applicable to wheel lockup for the reasons we have already stated. Without such a conflict, the concern of the preemption provision simply is not implicated.[17]

B. The Language of the Savings Provision

Even if the Court were to conclude, contrary to our arguments, that the preemption provision applies in the circumstances presented here, the savings provision of the Safety Act would foreclose a finding of express preemption of respondents' common law tort claims.

The savings provision is stated in simple and straightforward terms: "Compliance with *any* Federal motor vehicle safety standard issued under this subchapter does not exempt *any* person from *any* liability under common law." 15 U.S.C. § 1397(k) (emphasis added).

On its face, this provision is sweeping and unambiguous. "Compliance with any Federal . . . safety standard" is a phrase that does not admit of qualification. It cannot be read to mean only compliance with certain federal safety standards, or to except from its scope safety standards that deal with the particular question of design or performance at issue in a given common law action.

Similarly, the phrase "does not exempt any person from any liability under common law" does not on its

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[17] For the reasons stated in text, the appellate decisions on the subject hold that the term "aspect of performance" must be given a narrow reading consistent with its purposes. *See Wood v. General Motors Corp.*, 865 F.2d 395, 409 (1st Cir. 1988) (citing *Chrysler Corp. v. Rhodes*, 416 F.2d 319 (1st Cir. 1969)), *cert. denied*, 494 U.S. 1065 (1990); *Chrysler Corp. v. Tofany*, 419 F.2d 499, 509-10 (2d Cir. 1969). This issue was not addressed by the Eleventh Circuit below.

face admit of qualification. "[A]ny liability under common law" is all inclusive. That phrase cannot fairly be read to mean that the Safety Act provides any basis for exempting any defendant from any liability under common law. *See United States v. James*, 478 U.S. 597, 604 (1986) (the federal statute "outlines immunity in sweeping terms: 'No liability of *any* kind shall attach to or rest upon the United States for *any* damage from or by floods or flood waters at *any* place.' It is difficult to imagine broader language.") (emphasis by Court).

C. The Legislative History

The legislative history of the Safety Act confirms the conclusion—there is no express preemption—that flows from the plain language of the Act.

The Congress that enacted the Safety Act in 1966 was well aware of the existence of state common law design defect lawsuits of the type involved here. *See, e.g., Hearings on H.R. 13228 Before the House Committee on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 1256-57 (1966) ("*House Hearings*") (testimony of Representative Charles P. Farnsley regarding design defect litigation involving the General Motor's Corvair); *id.* at 1315 (statement of Daniel P. Moynihan regarding the case of *Comstock v. General Motors Corp.*, 99 N.W.2d 627 (Mich. 1959)); *House Hearings* at 1351 (statement of Mr. Maurice A. Garbell concerning Corvair design defect litigation); *Hearings on S. 3005 Before the Senate Committee on Commerce*, 89th Cong., 2d Sess. 252 (1966) (testimony of Dr. Seymour Charles noting the pendency of 100 lawsuits challenging the safety design of the Corvair). *See also generally* Kurt B. Chadwill, *Automobile Passive Restraint Claims Post-Cipollone: An End To The Federal Preemption Defense*, 46 Baylor L. Rev. 141, 178 n.223 (1994).

In light of this knowledge, the Safety Act's preemption provision and savings provision were crafted by Congress

with the intent to ensure that the Act did not preempt any such common law actions.

1. *The Senate Bill*

The bill reported out of the Senate Commerce Committee and passed by the full Senate—S. 3005, 89th Cong., 2d Sess. (introduced on March 2, 1996)—contained a preemption provision, section 104 of the bill, similar to the bill ultimately enacted into law, except that it did not contain the "same aspect of performance" limitation. *See* 112 Cong. Rec. 14,257 (1966). But the Senate bill did *not* include a savings provision. Even so, the Senate Committee Report stated, with respect to the preemption provision of the bill, that:

> [T]he Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law. [S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966).]

And Senator Magnuson, the sponsor of the Senate bill, stated on the floor of the Senate that:

> Compliance with Federal standards would not necessarily shield any person from broad liability at the common law. The *common law on product liability still remains as it was.* [112 Cong. Rec. 14,230 (1966) (emphasis added).] [18]

2. *The House Bill*

a. The original House bill contained a preemption provision, section 102(b) of the bill, similar to the preemption provision in the Senate bill, and like the Senate bill did not contain a savings provision. *See* H.R. 13228, 89th Cong., 2d Sess. (introduced on March 2, 1966).

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[18] *See infra* note 22 for a discussion of what "need not" and "not necessarily" meant.

During the Interstate and Foreign Commerce Committee hearings on that bill, an attorney from South Carolina raised the following pointed concern regarding the possible effect of the House bill on the liability of manufacturers under state law:

> We need a traffic safety agency and we need to research our problem from end to end, but we don't need to relieve the manufacturer of his natural responsibility for the performance of his product.
>
> You may think that the manufacturer is afraid of Government regulation but the cry you are hearing may be "Brer Fox, please don't throw me in the briar patch." If the Government assumes the responsibility of safety design in our vehicles, the manufacturers will join together for another 30-year snooze under the veil of Government sanction and in thousands of courtrooms across the Nation wronged individuals will encounter the stone wall of "Our product meets Government standards," and an already compounded problem will be recompounded. [*House Hearings* at 1249 (testimony of Mr. Tom Triplett).]

Representative Farnsley, a member of the Committee, referred to this testimony a few moments later:

> This gentleman has raised, perhaps not brilliantly but I think well, [a] question. . . .
>
> He said Brer Rabbit told Brer Fox "Don't throw me in the briar patch." . . .
>
> . . . Now the question is up: Is the manufacturer responsible for inherent dangerous design? If there are Federal standards, this man has said this brings an absolute wall against those suits, and he feels that the manufacturers want these standards. I think maybe he has a point.
>
> . . . .
>
> [T]he courts, under the old common law and our statutes, hold them responsible. Now I think we

> should take a long time before we change that responsibility. I have talked longer than I intended to, but I feel this is very important. [*Id.* at 1256-57.]

Representative Farnsley then engaged in the following colloquy with Committee Chairman Staggers, who was the sponsor of the House bill:

> THE CHAIRMAN. I would say to you again, and I have this much faith and I know you do too, in the men who sit on this committee, that *we will not put an umbrella over anyone.*
>
> MR. FARNSLEY. Good. You believe, then, you can set Federal standards and this isn't a defense in a lawsuit, to say, "We have met Federal standards"? That is what this witness said.
>
> THE CHAIRMAN. *That is not the intent of this legislation.*
>
> MR. FARNSLEY. I know it is not the intent, but is it possible?
>
> THE CHAIRMAN. It could be if we did not accept our responsibility here as a committee. *But we do not intend to put that umbrella up, I assure you.* [*Id.* at 1258 (emphasis added).]

Representative Mackay intervened to drive home the point:

> With regard to title I, which I predict is going to be the real hard nut to crack in the minds of the committee because of its complexity, the agency bill provides for certification of vehicles that actually met *minimum* safety standards.
>
> This does not preclude building a car with higher standards of safety, *nor does it relieve makers of any legal liability whatsoever in terms of their obligation to the consumer.* [*Id.* at 1260 (emphasis added).]

b. Consistent with the foregoing, the House Committee amended the original House bill. Specifically, the Committee inserted a savings provision, section 108(c) of the House bill, identical in all respects to the savings pro-

vision ultimately included in the bill signed into law: "Compliance with *any* Federal motor vehicle safety standard issued under this title does not exempt *any* person from *any* liability under common law." *See* 112 Cong. Rec. 19,625, 19,657 (1966) (emphasis added).[19]

The savings provision was explained in the House Committee Report as follows:

> *Common Law Liability.* Section 108(c) of the reported bill provides that compliance with any Federal motor vehicle safety standard does not exempt a person from any liability under common law.
>
> It is intended and this subsection specifically establishes, that *compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability.* [H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) ("*House Report*") (emphasis added).]

c. During the floor debates on the reported House bill, Representative O'Neill proposed an amendment that would have strengthened the remedial provisions of the bill by adding criminal penalties for willful violations of the Act. In opposing this amendment, Representative Dingell, a member of the House Committee that had reported the bill, stated:

> We are told . . . that this legislation is not strong enough. A look at the bill, at what the committee has brought to the floor, disproves this. . . . [*W*]*e have preserved every single common-law remedy that exists against a manufacturer for the benefit of a motor vehicle purchaser.* This means that all of the warranties and all of the other devices of common law which are afforded to the purchaser, remain

[19] The preemption provision in the original House bill was also amended to add the phrase "aspect of performance." No explanation of this change appears in the House Committee Report.

> in the buyer, and they can be exercised against the manufacturer. [112 Cong. Rec. 19,663 (1966) (emphasis added).]

The amendment was defeated. *Id.* at 19,664. The reported bill then passed the full House with certain minor amendments not relevant here. *Id.* at 19,664-669.

3. *The Senate-House Conference*

A Senate-House Conference Committee was convened to reconcile the differences between the Senate and House bills. The Conference Committee adopted the savings provision of the House bill *in haec verba*, and also adopted the House version of the preemption provision with certain minor changes not relevant here.[20]

The Conference Committee Report made no mention of the Senate's agreement to the savings provision included in the House bill. But the Senate conferees' understanding of the savings provision was clearly stated on the floor of the Senate by Senator Magnuson, the sponsor of the Senate bill, as well as by Senator Cotton, a conferee. Senator Magnuson stated:

> The Senate conferees accepted the House provision that compliance with Federal standards does not exempt any person from common law liability. This provision makes explicit, in the bill, a principle developed in the Senate report.[21] This provision does not prevent any person from introducing in a lawsuit evidence of compliance or noncompliance with Federal standards. No court rules of evidence are intended to be altered by this provision. [112 Cong. Rec. 21,487 (1966).]

And Senator Cotton explained:

[20] Those minor changes are described in the Conference Committee Report. *See* H.R. Rep. No. 1919, 89th Cong., 2d Sess. 16 (1966).

[21] *See supra*, p. 21.

> The Senate conferees also yielded on a provision, inserted by the House, declaring that compliance with any Federal standard does not exempt any person from liability under common law. Nevertheless, it seems clear and was, I believe, the consensus of the conferees on both sides, that proof of compliance with Federal standards may be offered in any proceeding for such relevance and weight as courts and juries may give it. [*Id.* at 21,490.] [22]

D. The Lessons

This review of the language and history of the Safety Act's preemption provision and savings provision should dispose of any argument that the Act expressly preempts respondents' common law tort claims. As we have shown, the preemption provision does not even come into play here both because state tort law is not a "safety standard" and because Standard 121 does not regulate the "aspect of performance" at issue in the common law tort claims brought by respondents. More fundamentally, as the language of the preemption provision and the savings provision reveals, and as the legislative history confirms, Congress did not intend those provisions to preempt common law tort actions. The history shows that Congress did not intend the preemption provision to have that effect, and Congress made doubly certain that it would not by adding the savings provision, which is stated in sweeping and unambiguous terms. The House Report summarizes the point in words that bear repeating here:

> It is intended and [the savings provision] specifically establishes, that [as a matter of federal law] compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to . . . tort liability. [*House Report* at 24.]

Thus, the language and history of these provisions leave no room for the conclusion that the Safety Act expressly preempts respondents' common law tort claims. It is simply implausible to find in the preemption provision and the savings provision a " 'clear' and 'manifest' " federal statutory purpose "[t]o displace traditional state [law] in such a manner." *BFP v. Resolution Trust Corp.*, 114 S. Ct. at 1765 (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990)). To the contrary, Congress reconciled the federal interests in regulating motor vehicle safety and the state interests in preservation of common law tort remedies for those injured in motor vehicle accidents by determining that both schemes could and should coexist.

E. Responses to Petitioners' Contentions

Petitioners' particular contentions in support of their position that the Safety Act expressly preempts the common law tort actions here merit only brief discussion. Petitioners and their *amici* argue, on the premise that the preemption provision applies here, that the savings provision does not serve to defeat the application of the preemption provision.

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[22] One of petitioners' *amici* seeks to make much of the fact that in the Senate Report and in Senator Magnuson's floor comments on the reported Senate bill—all of which predated the House's addition of the savings provision ultimately adopted in Conference—reference was made to the fact that federal standards would "not necessarily" shield any person from common law liability (*see supra*, p. 21), the supposed implication being that certain categories of common law actions might be foreclosed by the Safety Act. *See* Brief *Amicus Curiae* of the Product Liability Advisory Council, Inc. at 22-23. However, the later statements of Senators Magnuson and Cotton explaining the Conference Report indicate that the phrase "not necessarily" was intended merely to clarify the point that the Safety Act would not override the application of *state law* that may allow tort defendants to introduce evidence of compliance with federal standards as bearing on the reasonableness of their conduct. In Senator Cotton's words, state courts are free to determine the "relevance and weight" to be accorded compliance with federal standards. Thus, compliance with federal safety standards might, but would "not necessarily," shield manufacturers from liability in any given tort case, depending on the *state* law.

Petitioners' first argument is that the savings provision is intended only to establish that compliance with federal safety standards does not preclude common law liability "in respect to matters that the agency does not address." Pet. Br. 29 n.16; *see also id.* 38-39. In other words, according to petitioners, "the [savings] provision would explicitly establish the absence of any implied field preemption broader than the express field preemption laid down in Section 1392(d)." *Id.* 29 n.16. The simple answer to this argument is that it cannot be squared with the language of either the preemption provision or the savings provision.

As we have discussed, the preemption provision by its terms applies only when there is a federal safety standard in place and a state safety standard regulates "the same aspect of performance" as the federal standard. Thus, the scope of the preemption provision is clearly limited to situations where state and federal regulations address the same matter. The preemption provision cannot be read to give rise to any "broader" field preemption of matters not regulated by the federal agency. Accordingly, there would be no reason for the savings provision to address the prospect of such "broader" field preemption.[23]

In any event, the terms of the savings provision are not susceptible to petitioners' reading. "Compliance with *any* federal motor vehicle safety standard" is all-inclusive language that cannot be read to exclude standards that regulate the very conduct at issue in a common law action.

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[23] Petitioners effectively concede the point when they note "the rarity with which congressional intent to preclude States from acting in an entire area of regulation may be found *implicit* in a statute that contains a more limited express provision addressing that very question." Pet. Br. 25 (emphasis in original). *See also* Brief of *Amicus Curiae* Product Liability Advisory Council, Inc. In Support Of Petitioners 28-29.

Petitioners' second argument in support of express preemption proffers yet another interpretation of the savings provision. Under this interpretation, the savings provision is meant only to prohibit state law from making compliance with a federal safety standard a defense in a common law tort action. Pet. Br. 37-38 n.28. Judge Selya, in his dissent in *Wood v. General Motors Corp.*, 865 F.2d at 426, articulated the central fallacy of this interpretation: "It would be a strange 'savings clause' indeed which could salvage an action on the merits in this fashion but be impuissant to stop preemption . . . ." And the House Report specifically belies this "strange" interpretation of the savings provision: "[C]ompliance with safety standards is not to be a defense *or otherwise to affect the rights of* parties under common law particularly those relating to . . . tort liability." *House Report* at 24 (emphasis added). This is the tenor of the entire legislative history of the savings provision. *See supra,* pp. 20-26.

Moreover, it would be equally strange for Congress to purport to dictate to the States the contours of a defense in a common law action. As we have discussed, the contrary is true. In the words of Senator Cotton: "[I]t seems clear and was, I believe, the consensus of the conferees on both sides, that proof of compliance with Federal standards may be offered in any [common law] proceeding for such relevance and weight as courts and juries may give it." 112 Cong. Rec. at 21,490.

Finally, petitioners appear to suggest, based on *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992), that where a statute contains both a preemption provision and a savings provision, the former must be deemed to supersede the latter where both provisions apply. Pet. Br. 35-36 & n.26. Putting aside our submission that the preemption provision in the Safety Act does *not* apply here, *see supra,* pp. 15-19, petitioners' suggestion misses the point of *Morales.* The Court in *Morales* found that the preemp-

tion provision in that case superseded the savings provision for two specific reasons: the preemption provision specifically addressed the subject in question while the savings clause did not; and the preemption provision was added to the statute in subsequent legislation leaving the savings provision, insofar as it might apply to the subject matter addressed by the preemption provision, a "relic" of the prior statutory regime. 112 S. Ct. at 2037.

The circumstances here are virtually the opposite of those in *Morales*. Here, it is the savings provision, not the preemption provision, that specifically addresses the effect of the Safety Act on common law claims; and here, it is the savings provision that was added to a bill that already contained the preemption provision. If anything, *Morales* would support the notion that if the preemption provision and the savings provision here were somehow in tension—which we have shown they are not—the savings provision would control.

Thus, none of petitioners' arguments provides a basis for reading the language and history of the two pertinent provisions of the Safety Act to mean anything other than what we have shown them to mean. And we have shown that those provisions do not preempt the common law tort actions here.

II. THERE IS NO IMPLIED PREEMPTION HERE

Petitioners argue in the alternative that the Safety Act impliedly preempts the state common law action here. Petitioners' contention rests on the factual premise that if respondents are successful in their common law actions, the result of those actions would be in conflict with Standard 121. And petitioners' contention rests on the legal premise that, notwithstanding the specific and unqualified language of the savings provision, Congress must have intended implicitly that the Safety Act would preempt common law actions that conflict with a federal safety standard.

As we show in this part of the brief, both of petitioners' premises are incorrect. Either showing alone is sufficient to defeat petitioners' implied preemption claim.

A. Respondents' Common Law Claims Do Not Conflict With Standard 121

The threshold premise of petitioners' implied preemption argument is that a conflict exists between Standard 121 and the relief sought in respondents' common law tort actions. In fact, there is no such conflict. Therefore, whether or not the savings provision leaves room for implied conflict preemption of common law actions, there could be no such preemption here.

"The 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.'" *English v. General Elec. Co.*, 496 U.S. at 90 (ellipsis and brackets by Court in quoting *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960)). Here, petitioners ask this Court to seek out a conflict where clearly none exists.

As we have shown, Standard 121, as amended, does not impose any requirement on manufacturers of trucks and trailers to install or not to install antilock devices. The amended Standard expressly states that the provisions of the Standard deemed to require antilock devices "are not applicable to trucks and trailers." *See supra*, pp. 7-8.

Nevertheless, petitioners contend that, if they are found liable in the common law actions here as a result of their failure to install antilock brakes, that result would conflict with Standard 121. Petitioners apparently seek to invoke the doctrine that, when consistent with the intent of Congress, implied conflict preemption may be found "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204

(1983) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Petitioners assert that the common law actions here would be obstacles to the accomplishment of the objectives of Standard 121 based upon two different characterizations of that Standard.

First, petitioners contend that "Standard 121 embodies a determination . . . [that] *requiring* [antilock] brakes would itself present an unreasonable risk to safety, in contravention of the Safety Act." Pet. Br. 16 (emphasis in original). This characterization of Standard 121 is too clever by half and does not, when analyzed, serve petitioners' cause.

Nothing in Standard 121 indicates that antilock devices for trucks or trailers are inherently dangerous. Had NHTSA made such a finding, presumably the agency would have adopted a standard prohibiting the use of such devices. But, to the contrary, in the original Standard 121, NHTSA had determined, based on the record before it, to require the installation of antilock devices on trucks and trailers. It was the Ninth Circuit in *Paccar*, based on its own review of the record, that concluded that while antilock devices achieved safety advances on some trucks and trailers, "there is a strong probability that the performance of *a substantial number of vehicles*" was rendered "potentially more hazardous" by the installation of antilock devices. 573 F.2d at 643 (emphasis added). Thus, the Ninth Circuit concluded that on some trucks and trailers the use of antilock devices might be a hazard, and on that basis the court held that the agency could not enforce the requirement, which applied to all trucks and trailers, without more evidence. *Id.*

Based on the *Paccar* decision, as we have discussed, NHTSA determined to amend Standard 121 to make the antilock device requirement inapplicable to trucks and trailers. At the same time, NHTSA rejected a request that it "make a finding that all vehicles built to conform to

the invalidated requirements contain a safety-related defect that justifies their recall." 44 Fed. Reg. at 9784. To the contrary, NHTSA "recommend[ed] that antilock systems on existing vehicles be maintained . . . in order to achieve the benefits for which the systems were designed." *Id.* And NHTSA noted with apparent approval that certain manufacturers were continuing to install antilock devices on trucks and trailers, even though no longer required to do so. *Id.* at 9785.

Even if for preemption purposes it were appropriate to attribute to the agency the "findings" of the Ninth Circuit, the net result of this sequence of events does not leave amended Standard 121 in conflict with the relief requested in respondents' common law actions. The conclusion that, on a record before the Ninth Circuit in 1978, antilock devices might be potentially hazardous on some trucks and trailers, thereby calling into question the validity of an across-the-board antilock device requirement for all trucks and trailers, is in no way inconsistent with a finding that it was tortious for particular truck manufacturers to fail to install such devices on particular trucks manufactured in 1982 and 1987—the particular trucks that, respectively, killed Mrs. Lindsey and maimed Mr. Myrick.

Petitioners will be free in defense of the common law actions here to present whatever evidence they believe may support the reasonableness of their determination not to install antilock devices. Whatever decision may eventuate as to the particular trucks involved here, that decision will not conflict with the federal determination not to impose a requirement to install antilock devices on *all* trucks and trailers.

Second, petitioners assert that Standard 121 "deliberately afforded truck manufacturers an option to install or to omit antilock brake systems." Pet. Br. 17. To the extent that this characterization is accurate, it is simply a meaningless truism. Any decision not to regulate an

area of conduct necessarily results in actors being free to choose among the available courses of action in that area of conduct. To say that government confers an "option" by failing to dictate choices is to reverse the normal understanding of the relationship between the government and the citizenry. And part of that normal understanding is that when a citizen acts in an area where his choices are not constrained by positive law, he is responsible for the consequences if his choices are tortious and result in injuries to others.[24]

In short, the relief sought in these common law tort actions is in no way inconsistent with any requirement or objective of Standard 121.

B. The Express Provisions of the Safety Act Leave No Room for Implied Preemption of Common Law Tort Actions

1. *The Applicable Principles*

As we have already discussed, the Safety Act contains an express preemption provision (15 U.S.C. § 1392(d)),

[24] Of course, Congress or a federal regulatory agency could make an affirmative determination to build a number of specific options into a federal regulatory scheme, based on the judgment that to do so would further federal interests. In that event, the availability of each of the specified options might be integral to the federal regulatory scheme, and a state regulation that interfered with the availability of any one of those options might be inconsistent with the federal scheme. *See Fidelity Fed. Savs. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982). Standard 121 reflects no such affirmative determination.

But even if a federal regulation expressly specifies options (as Standard 121 does not), that does not necessarily mean that there is a federal interest in maintaining the availability of each specified option. The options may have been enumerated merely to provide guidance to manufacturers that choosing any of those options would constitute compliance with a federal mandate. In that event, there would be federal indifference as to which of the options a manufacturer chooses. And state tort law preferring one of the options would not conflict with federal interests.

which defines the circumstances in which a state safety standard is to be preempted, and an express savings provision (15 U.S.C. § 1397(k)), which provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." Petitioners ask this Court to find that, despite these express provisions, Congress intended that courts would imply preemption, where Congress has not provided for it, indeed, where Congress on the plain words of the savings provision has precluded it.

When a federal statute is claimed to preempt state law, whether that claim rests on an express provision of the statute or on an implication from the substantive provisions of the statute, the question raised is simply and only as to the intent of the Congress that enacted the statute. *BFP v. Resolution Trust Corp.*, 114 S. Ct. at 1765. *See also supra* note 10. In ascertaining the intent of Congress,

> [a]s always, we begin with the language of the statute and ask whether Congress has spoken on the subject before us. "If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress." [*Norfolk & Western Ry. Co. v. American Train Dispatchers Assoc.*, 111 S. Ct. 1156, 1163 (1991) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984)).]

Careful attention to the intent of Congress is of particular importance when the issue involved is displacement of traditional state laws. Thus, even where, unlike here, Congress has not expressly addressed the issue of preemption, preemption by implication will not be found unless the intent of Congress to accomplish that result is " 'clear and manifest.' " *BFP v. Resolution Trust Corp.*, 114 S. Ct. at 1765 (quoting *English v. General Elec. Co.*, 496 U.S. at 79).

In this regard, it is useful to consider the 1989 Report of the United States Appellate Judges Conference of the American Bar Association, entitled *The Law of Preemption*, which states:

> Our federal system, with its high regard for the several states' powers of governance, requires that judges not preempt state laws lightly. Concerns of democratic theory and judicial competence generally counsel courts to attend to Congress's clearly expressed intent. When courts consider whether Congress intended to preempt state laws, however, the nation's commitment to federalism would seem to argue for an especially clear statement of congressional intent to oust states from their traditional legislative functions. For if in close or uncertain cases a court proceeds to preempt state laws where that result was not clearly the product of Congress's considered judgment, the court has eroded the dual system of government that ensures our liberties, representation, diversity, and effective governance. [United States Appellate Judges Report at 40 (footnote omitted).]

At the very least, the foregoing principles and considerations preclude implication of a congressional intent to preempt state laws when, as here, Congress has directly spoken to the precise question of preemption at issue and has in express terms declared its intent not to preempt. Without belaboring the point, by its plain and unambiguous terms, the savings provision flatly and unqualifiedly precludes preemption of any common law action based on compliance with any federal safety standard. *See supra*, pp. 19-20.

This Court in *Cipollone* made clear that, under these circumstances, courts cannot justify an implication that Congress intended to provide for preemption:

> When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when

> that provision provides a "reliable indicium of Congressional intent with respect to state authority," *Malone v. White Motor Corp.*, 435 U.S., at 505, 98 S. Ct., at 1190, "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282, 107 S. Ct. 683, 696, 93 L. Ed. 2d 613 (1987) (opinion of Marshall, J.). [*Cipollone*, 112 S. Ct. at 2618.]

Accord id. at 2625 (Blackmun, J., joined by Kennedy, J., and Souter, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("We resort to principles of implied pre-emption—that is, inquiring whether Congress has occupied a particular field with the intent to supplant state law or whether state law actually conflicts with federal law—only when Congress has been silent with respect to pre-emption.") (internal citation omitted).

Here the plain terms of the savings provision, and the clear confirmation of those terms in the legislative history, provide a "reliable indicium" that Congress did not intend federal safety standards to preempt common law tort actions. Therefore, the implied preemption of common law claims by the Safety Act is foreclosed by the Act's express provisions.

2. *Responses to Petitioners' Contentions*

We respond here briefly to particular arguments raised by petitioners to justify implied preemption in the face of the express provisions of the Safety Act to the contrary.

First, petitioners argue that implied conflict preemption cannot be foreclosed by the expression of a congressional intent to preserve certain state laws, because in the event of a conflict between the substantive provisions of a state law and those of a federal law, the state law necessarily falls "by direct operation of the Supremacy Clause." *See* Pet. Br. 17-19, 21-22.

This argument is simply wrong. By its terms, the Supremacy Clause provides that the "Constitution" and "the Laws of the United States which shall be made in Pursuance thereof" are "the supreme Law of the Land." U.S. Const., Art. VI, cl. 2. If a "Law[] of the United States" expresses a congressional intent not to preempt certain state laws that a court might otherwise deem to be in conflict with the federal statute, that express congressional intent is part of "the supreme law of the Land," and it must be respected as much as other provisions of the statute. Petitioners cannot avoid the simple truth that whether state laws are "invalid under the Supremacy Clause depends on the intent of Congress." *Malone v. White Motor Co.*, 435 U.S. at 504.

Second, petitioners proffer a lengthy argument that the *Cipollone* passage quoted above cannot mean what it says. Pet. Br. 19-22. Petitioners posit that there are circumstances where Congress will have focused on the preemptive effect of a statute as to a particular area of state law and expressed a view thereon in the statute, without intending thereby to nullify the implied preemption that otherwise would be found with respect to *other* areas of state law as to which Congress has not expressed a view on preemption. *Id.* 20. But petitioners are simply misreading the passage from *Cipollone*. The passage contains an important limitation that addresses petitioners' concern: the express preemption provision must be a "reliable indicium of congressional intent with respect to state authority." *See supra*, p. 37. In the situation posited by petitioners, where Congress has not addressed the preemptive effect of a statute on a particular body of state law, it should be demonstrable that the preemption provision in the statute is not a "reliable indicium" of congressional intent with respect to preemption of that body of state law.

In any event, petitioners' argument in this regard has no application to this case. Here, the savings provision

is explicitly directed at the entire body of common law tort actions. And the plain language and legislative history of that provision make clear—are "reliable indici[a]"—that Congress intended that body of state law not to be preempted by the Safety Act.

Third, petitioners contend that "it has long been clear that when Congress addresses the question of state authority through a broadly worded savings clause, it is *not*, absent clear statement, to be inferred that Congress has allowed the States to contradict its regulatory policies." Pet. Br. 22-23 (emphasis in original). Petitioners jump from that contention to the conclusion that "a broad savings clause that *explicitly* and sweepingly preserves state authority will not ordinarily be read to oust conflict preemption and thus does not preserve conflicting state laws." *Id.* 23. (emphasis in original).

The proposition that courts ordinarily do not give full effect to savings clauses that "explicitly" preserve state authority is itself a sweeping statement, which is on its face inconsistent with the basic principles governing preemption that we have previously discussed. *See supra*, pp. 11-13. Not surprisingly, the cases relied upon by petitioners do not support the proposition. Each of those cases turned on the specific language of the savings provision at issue and on the role of that provision in the statutory scheme as a whole. And, based on analysis of those materials, each of the cases petitioners cite found that the particular savings clause at issue did not reflect a congressional intent to bar conflict preemption.

Thus, in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), the scope of the savings provision at issue was limited by the words "Nothing in this section"—as distinct from a phrase such as "nothing in this Act"—and, as a result, according to the Court, the savings provision "does not purport to preclude preemption of state law by other provisions of the Act." *Id.* at 493. The conflict

preemption asserted in the case was said to flow from those "other provisions of the Act." Accordingly, the Court stated that "[t]o begin with, the plain language of the [savings] provision[] . . . by no means compels the" conclusion that a conflict between those other provisions of the Act and state law could not result in preemption. *Id.* And the Court concluded "that the Act itself does not speak directly to [that] issue." *Id.*

Similarly, petitioners rely on a line of cases interpreting a savings provision in the Interstate Commerce Act. Pet. Br. 23. In that Act, the savings provision at issue purported to preserve state common law and statutory remedies with the following proviso: "but the provisions of this act are in addition to such remedies." *See Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907); *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328 (1981). In each case, the Court found that the "manifest" and "evident[]" purpose of the savings clause was to preclude the possible inference from other provisions of the Act that the federal remedies provided by the Act were exclusive, which would have prevented the States from exercising concurrent jurisdiction over claimed violations of the Act. *Abilene Cotton*, 204 U.S. at 446-47; *Puritan Coal Mining*, 237 U.S. at 129; *Kalo Brick & Tile*, 450 U.S. at 328. But, given the language of the proviso—that the remedies of the Act "are in addition to" state remedies—the Court also concluded in these cases that the savings clause was not meant to preserve the ability of the States to provide remedies inconsistent with the substantive provisions of the Act.

The savings provision here does not contain a limitation or proviso of the type found in the savings provisions at issue in the cases cited by petitioners. To the contrary, the savings provision here contains no qualifying or limiting language. The cases cited by petitioners in this regard

thus do nothing to further the inquiry here. And the lesson petitioners seek to draw from those cases is sheer overstatement.

Fourth, propped up by the premises they have drawn from their three preceding arguments, petitioners make one final contention: to avoid a "radical[]" transformation of what petitioners believe this Court's preemption jurisprudence to be, the *Cipollone* passage quoted *supra*, pp. 36-37, should be read narrowly so as to apply only to implied *field* preemption and not to implied *conflict* preemption. Pet. Br. 24-28.

At the outset, we note that *Cipollone* itself involved a claim of implied *conflict* preemption, not implied *field* preemption. 112 S. Ct. at 2615. And the quoted passage itself makes no distinction between implied conflict preemption and implied field preemption. Indeed, both the concurring opinion and the dissent in *Cipollone* read the passage to cover *both* types of implied preemption. *See* 112 S. Ct. at 2625 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 2633-34 (Scalia, J., dissenting).

More fundamentally, the *Cipollone* passage is well within the mainstream of this Court's established principles governing statutory interpretation in general, and preemption analysis in particular. *See supra*, pp. 11-13, 35-36. Where, as here, Congress makes the express and unqualified judgment to preserve common law claims, it is not a novel concept to hold that courts must defer to that judgment. If any notion is a "radical" departure from established principles, it is the notion that courts should ignore the express words of a statute and imply a result that is directly contrary to those words.

In the language of the savings provision here, and in the historical materials underlying that provision, Congress chose to reconcile the federal interest in regulating motor vehicle safety with the States' historic police powers

by preserving the States' traditional power to provide common law remedies for traffic accident victims even when the defendant is in compliance with federal regulations. The sum and substance of petitioners' position is that this Court should redraw the balance between state and federal interests that Congress carefully crafted in the Safety Act. This Court recognized in *Cipollone* that that is not this Court's function.

This Court made the same point when a similar argument was made in *Silkwood v. Kerr-McGee Corp.*:

> We also reject Kerr-McGee's submission that the punitive damages award in this case conflicts with Congress' express intent to preclude dual regulation of radiation hazards. As we explained in Part A, Congress did not believe that it was inconsistent to vest the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Mr. Silkwood to recover for injuries caused by nuclear hazards. *We are not authorized to second-guess that conclusion.* [464 U.S. at 257-58 (citation omitted) (emphasis added).]

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eleventh Circuit in this case should be affirmed.

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